

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MARIYAM AKMAL,

Plaintiff,

v.

CENTERSTANCE, INC., TRUEBLUE,  
INC., an agent of Labor Ready, JOHN  
AND JANE DOES 1-10,

Defendants.

CASE NO. 11-5378 RJB

ORDER REGARDING  
DEFENDANTS' MOTIONS TO  
DISMISS

This matter comes before the Court on the Defendant NTT Centerstance, Inc.'s (f/k/a Centerstance Inc.) ("NTT Centerstance") Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B), and 12(b)(5) or, in the Alternative, for a More Definite Statement (Dkt. 42) and Defendant TrueBlue, Inc.'s Joinder of Motion filed by NTT Centerstance, Inc. to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B), and 12(b)(5) or, in the Alternative, for a More Definite Statement (Dkt. 43). The Court has reviewed the relevant pleadings, the record, and is fully advised.

I. **FACTS AND PROCEDURAL HISTORY**

**A. FACTS IN PLAINTIFF'S COMPLAINT**

On May 17, 2011, Plaintiff, an African American woman, filed this discrimination action.

Dkt. 1. Plaintiff states that she entered into an employment agreement with "the IT placement

1 firm Centerstance” in February of 2007. Dkt. 4, at 2. (Although Plaintiff references this  
2 agreement, it is not attached to the Complaint.) The agreement with NTT Centerstance  
3 purportedly “involved an internal software development project with [NTT Centerstance’s] client  
4 TrueBlue . . . who was operating under the trade name of Labor Ready.” *Id.* She alleges that the  
5 agreement had an ending date of August 14, 2007, with a possible extension. *Id.*, at 3. Plaintiff  
6 asserts that the agreement stated that it could be terminated “without cause” with 15 days notice  
7 and NTT Centerstance terminated the agreement with only 14 days notice. *Id.*, at 6. Plaintiff  
8 contends that while on the job, she performed her duties in accord with “industry standards,” and  
9 received no complaints from the Defendants about her performance. *Id.*, at 3.

10 Plaintiff asserts that she was, at some point, referred to as “sand nigger,” “dot-head from  
11 the middle-east,” and “smelly mid-eastern terrorist breeders.” *Id.*, at 4. (Plaintiff does attach  
12 emails utilizing that language, but those emails are dated in February and March of 2003 (Dkt. 4-  
13 4), four years before she alleges she had any contact with Defendants and or/their employees.)

14 In any event, Plaintiff alleges that she has a history of “activism” related to women and  
15 cyber stalking. *Id.* at 3. Plaintiff asserts that her activism became “a major point of contention at  
16 work” and that the environment at TrueBlue became “hostile.” *Id.* at 3-4. She requested NTT  
17 Centerstance move her away from her “antagonist,” whom she asserts was an employee of  
18 Defendant True Blue. *Id.* Although her request to be moved was granted, a week later her  
19 contract was terminated two months early. *Id.* Plaintiff asserts that she was told that there was  
20 “insufficient work to keep her on the project.” *Id.*, at 4-5. Plaintiff states that Defendants  
21 continued to advertise for contractors to perform the same work she was performing until at least  
22 August of 2007. *Id.*, at 5. Plaintiff states that she tried to return to work for Labor Ready twice,  
23 but was not rehired. *Id.* She further alleges that “attempts by Plaintiff’s previous employer(s) to  
24 verify her employment on the project resulted in Plaintiff being told that they could no longer

1 work with her due to what Defendants were saying about her.” *Id.* Plaintiff cites 42 U.S.C. §  
2 1981, and asserts claims for breach of contract, “racial discrimination - interference with  
3 business contracts,” “racial discrimination – harassment,” and “racial discrimination –  
4 retaliation.” *Id.* Plaintiff alleges that she filed a complaint with the Equal Employment and  
5 Opportunity Commission. Dkt. 5.

## 6 **B. PROCEDURAL HISTORY**

7 Plaintiff filed her Complaint in this Court on May 19, 2011. Dkt. 4. Plaintiff was  
8 granted in forma pauperis status and on May 26, 2011, and Plaintiff’s Application for Court  
9 Appointed Counsel was referred to the Screening Committee of this Court’s pro bono panel.  
10 Dkt. 8. The Committee reviewed the case, and on August 22, 2011, declined to accept the case.  
11 Dkt. 19. Plaintiff’s Application for Court Appointed Counsel was denied on August 30, 2011,  
12 and her Motion for Reconsideration of the Order Denying the Application for Court Appointed  
13 Counsel was denied on September 13, 2011. Dkts. 19 and 21. On September 15, 2011, Plaintiff  
14 filed a Notice of Appeal regarding these two orders and the case was stayed. Dkts. 26 and 27.  
15 On January 3, 2013, the Ninth Circuit Court of Appeals dismissed Plaintiff’s appeal, finding that  
16 it did not have jurisdiction to consider her appeal. Dkt. 32. That same day, January 3, 2013,  
17 Plaintiff renewed her motion to have the Complaint served by the U.S. Marshals Service. Dkt.  
18 33. The Mandate issued on January 28, 2013, and the stay of the case was lifted as of that that  
19 day by minute order. Dkts. 34 and 44. On January 28, 2013, Plaintiff’s motion to have the U.S.  
20 Marshal Service serve her case on the named Defendants was granted and a new scheduling  
21 order was issued. Dkts. 35 and 36.

## 22 **C. PENDING MOTIONS**

23 Both Defendants have now filed motions to dismiss or in the alternative for a more  
24 definite statement. Dkts. 42 and 43. In its’ motion, NTT Centerstance, Inc. (“NTT

Centerstance”) moves for dismissal of Plaintiff’s Complaint, arguing that Plaintiff failed to comply with the service requirements of Rule 4(m), so pursuant to Rule 12(b)(5) the case should be dismissed. Dkts. 42 and 48. NTT Centerstance argues that Plaintiff’s Complaint should be dismissed for failure to state a claim because she has failed to allege sufficient facts to support a cognizable claim pursuant to 42 U.S.C. § 1981 (The Civil Rights Act of 1886), RCW 4.16.040(1)(Washington’s statute of limitations on contract actions), RCW 49.6.020 [sic] (perhaps 49.60.020 Washington Law Against Discrimination), RCW 19.86.070 (Washington Consumer Protection Act). *Id.* NTT Centerstance further argues that Plaintiff’s claims for “Breach of Contract – Failure to Give Requisite Notice,” “Racial Discrimination – Interference with Business Contract,” “Racial Discrimination – Harassment,” “Racial Discrimination – Retaliation,” should be dismissed for failure to state a claim. *Id.* NTT Centerstance also argues that Plaintiff’s Washington Law Against Discrimination claims should be dismissed due to the statute of limitations. *Id.* NTT Centerstance moves, in the alternative, for a more definite statement under Rule 12(e). *Id.*

Defendant TrueBlue, (erroneously named as “TrueBlue, Inc. d/b/a Labor Ready”) joins in NTT Centerstance’s motion. Dkts. 43 and 49.

Plaintiff responds, and argues that her case should not be dismissed based on her failure to serve the Complaint within 120 days because she made motions to have the Complaint served or for an extension of time (e.g. Dkts. 15 and 25), but the motions were stricken when the case was stayed pending the appeal. Dkt. 47. Plaintiff further argues that her case should not be dismissed for failure to state a claim without giving her an opportunity to amend her Complaint. *Id.*

## II. DISCUSSION

### A. MOTION TO DISMISS – SERVICE OF PROCESS

1 Fed. R. Civ. P. 4(m) provides:

2 If a defendant is not served within 120 days after the complaint is filed, the court--  
 3 on motion or on its own after notice to the plaintiff--must dismiss the action  
 4 without prejudice against that defendant or order that service be made within a  
 specified time. But if the plaintiff shows good cause for the failure, the court must  
 extend the time for service for an appropriate period.

5 The Complaint was filed on May 19, 2011. Dkt. 4. The case was stayed 119 days later  
 6 on September 15, 2011 while an appeal was pending. Dkt. 27. On January 3, 2013, the Ninth  
 7 Circuit issued its opinion, dismissing Plaintiff's appeal and Plaintiff filed her renewed motion to  
 8 have the Complaint served by the U.S. Marshals Service. Dkts. 32 and 33. The mandate from  
 9 the Ninth Circuit issued on January 28, 2013. Dkt. 34. Plaintiff's motion to have the case served  
 10 was granted and the Order directing service was entered that same day, on January 28, 2013.  
 11 Dkt. 35. Defendants were served on January 31, 2013. Dkts. 37 and 38.

12 Defendants' motion to dismiss based on Plaintiff's failure to serve the Complaint within  
 13 120 days should be denied. Plaintiff has shown good cause for the two day delay. The case was  
 14 stayed while the matter was on appeal. The Defendants were served by the U.S. Marshal Service  
 15 three days after the mandate issued and the stay was lifted. Dkts. 37 and 38. The case should  
 16 not be dismissed because the Complaint was served two days late.

#### 17 **B. MOTION TO DISMISS – FED. R. CIV. P. 12(b) STANDARD**

18 Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable  
 19 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*  
 20 *v. Pacifica Police Department*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990). Material allegations are taken  
 21 as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d  
 22 1295 (9<sup>th</sup> Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not  
 23 need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement  
 24 to relief requires more than labels and conclusions, and a formulaic recitation of the elements of

a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)(internal citations omitted). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

If a claim is based on a proper legal theory but fails to allege sufficient facts, the plaintiff should be afforded the opportunity to amend the complaint before dismissal. *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983). If the claim is not based on a proper legal theory, the claim should be dismissed. *Id.* “Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.” *Moss v. United States Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009)(internal citations omitted).

## C. MOTION TO DISMISS - FAILURE TO STATE A CLAIM

### 1. Federal Claim under 42 U.S.C. § 1981 of the Civil Rights Act of 1886

Section 1981 provides:

#### (a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

#### (b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

#### (c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

1 Section 1981 “prohibits racial discrimination in the making and enforcement of private  
2 contracts.” *Runyon v. McCrary*, 427 U.S. 160, 168 (1976). Whether a plaintiff faced intentional  
3 racial discrimination in violation of Section 1981 is governed by the *McDonnell Douglas* burden  
4 shifting test. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989)(*superseded by statute*  
5 *on other grounds*)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

6 The first step of the *McDonnell Douglas* test requires that Plaintiff establish a prima facie  
7 case of discrimination. *Coghlan v. American Seafoods Co. LLC*, 413 F.3d 1090, 1094 (9th Cir.  
8 2005). To do so, Plaintiff must establish that (1) she belongs to a protected class, (2) she was  
9 qualified for the position (she was performing her job in a satisfactory manner), (3) she was  
10 subjected to an adverse employment action, and (4) that “similarly situated individuals outside  
11 [the] protected class were treated more favorably, or other circumstances surrounding the  
12 adverse employment action give rise to an inference of discrimination.” *Peterson v. Hewlett-*  
13 *Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004); *Coghlan*, at 1094.

14 If the Plaintiff meets the first portion of the *McDonnell Douglas* test, “[t]he burden of  
15 production, but not persuasion, ... shifts to the [Defendants] to articulate some legitimate,  
16 nondiscriminatory reason for the challenged action.” *Chuang v. Univ. of Cal. Davis Bd. of*  
17 *Trustees*, 225 F.3d 1115, 1123-24 (9th Cir. 2000). In the last step of the *McDonnell Douglas*  
18 test, should the defendant carry this burden, “the plaintiff must then have an opportunity to prove  
19 by a preponderance of the evidence that the legitimate reasons offered by the defendant were not  
20 its true reasons, but were a pretext for discrimination.” *McDonnell Douglas* at 802.

21 Defendants’ motion to dismiss Plaintiff’s § 1981 claim, to the extent she makes one, is  
22 well taken. Although Plaintiff alleges in her Complaint that she is African American, and was  
23 qualified for the job she was performing satisfactorily, she does not allege facts regarding  
24 Defendant TrueBlue on the third element of the *McDonnell Douglas* prima facie test. She does

1 not allege that Defendant TrueBlue subjected her to an adverse employment action. (She does  
 2 allege that NTT Centerstance subjected her to an adverse employment action -the early  
 3 termination of her contractor's agreement with NTT Centerstance.) She failed to make a  
 4 showing on the fourth prima facie requirement under *McDonnell Douglas* as to either Defendant  
 5 TrueBlue or NTT Centerstance. Plaintiff did not allege sufficient facts from which to conclude  
 6 that that "similarly situated individuals outside [the] protected class were treated more  
 7 favorably," or "other circumstances surrounding the adverse employment action give rise to an  
 8 inference of discrimination." *Peterson*, at 603.

9 Plaintiff should, however, be afforded an opportunity to file an amended complaint  
 10 before her § 1981 claim is dismissed. *Moss* at 972. In their replies, Defendants argue that  
 11 Plaintiff should not be given leave to file an amended complaint because amendment would be  
 12 futile. Dkts. 48 and 49. In the interest of fully considering Plaintiff's case, leave to file an  
 13 amended complaint should be granted. Defendants' motion to dismiss Plaintiff's § 1981 claim  
 14 should be renoted to April 5, 2013, and will be considered in light of the sufficiency of Plaintiff's  
 15 amended pleading, if any.

## 16 2. State claims

### 17 a. *RCW 4.16.040(1) Statute of Limitations on Contract Actions*

18 RCW 4.16.040(1), provides that the statute of limitations for contract actions in  
 19 Washington is six years.

20 To the extent that Plaintiff makes a claim under this statute, her claim should be  
 21 dismissed. She fails to identify an independent cause of action arising under this statute.

### 22 b. *RCW 49.6.020*

23 To the extent that Plaintiff makes a claim pursuant to RCW 49.6.020, her claim should be  
 24 dismissed. There is no such statute.

c. RCW 49.60.020 - Washington Law Against Discrimination

Defendants assert two grounds for dismissal of Plaintiff's Washington Law Against Discrimination claims – failure to state a claim and the statute of limitations. Dkts. 42 and 43.

Washington courts have largely adopted the burden shifting scheme announced in *McDonnell Douglas* to claims of employment discrimination cases brought under the Washington Law Against Discrimination. *See Grimwood v. University of Puget Sound*, 110 Wash.2d 355, 362 (1988)(applying the *McDonnell Douglas* test to claim of employment discrimination brought under WLAD); *Coghlan v. American Seafoods Co. LLC*, 413 F.3d 1090, 1094 (9th Cir. 2005)(noting Washington's employment discrimination law largely parallels federal law under Title VII, and so treatment of a plaintiff's Title VII claim thus applies also to his similar claim under the WLAD); *Hernandez v. Space Labs Medical Inc.*, 343 F.3d 1107 (9th Cir. 2003)(applying *McDonnell Douglas* burden shifting test to sex discrimination claim brought under Title VII and the WLAD).

As stated above in the discussion of the § 1981 claim, Plaintiff has failed to allege sufficient facts to state a prima facie case under *McDonnell Douglas*, and so her WLAD claim should be dismissed.

Further, Plaintiff should not be afforded leave to amend, because such leave would be futile. The statute of limitations for actions involving claims under RCW 49.60 is three years. *Antonius v. King County*, 153 Wn.2d 256 262 (2004).

Here, all of the events of which Plaintiff complains occurred well before May of 2008, that is more than three years prior to her filing her Complaint in May of 2011. To the extent that Plaintiff asserts claims under WLAD for events occurring before May of 2008, her claims should be dismissed with prejudice as barred by the statute of limitations. Plaintiff's motion for leave to amend her complaint, to attempt to state claims under WLAD should be denied to the extent she

1 bases her claims on events occurring before May of 2008, because such claims would be barred  
 2 by the statute of limitations and amendment would be futile.

3 *d. RCW 19.86.070 – Washington Consumer Protection Act*

4 “Any person who is injured in his or her business or property by a violation of RCW  
 5 19.86.020 (“unfair methods of competition and unfair or deceptive acts or practices in the  
 6 conduct of any trade or commerce”). . . may bring a civil action.” RCW 19.86.090. The  
 7 elements of a private CPA violation are (1) an unfair or deceptive act or practice; (2) occurring in  
 8 trade or commerce; (3) that impacts the public interest; (4) and causes injury to the plaintiff in  
 9 his or her business or property; and (5) such injury is causally linked to the unfair or deceptive  
 10 act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986).  
 11 Ordinarily a breach of a private contract affecting no one but the parties to the contract is not an  
 12 act or practice affecting the public interest. *Id.* at 790.

13 Defendants’ motion to dismiss Plaintiff’s CPA claim is also well taken. Plaintiff has  
 14 failed to allege sufficient facts to state a claim under any of the basic elements required for a  
 15 CPA claim. Plaintiff should, however, be given leave to file an amended complaint. *See Moss*,  
 16 at 972. The Defendants’ motion to dismiss this claim should be renoted to April 5, 2013, and the  
 17 sufficiency of Plaintiff’s amended complaint, if any, will be evaluated.

18 *e. Breach of Contract*

19 To assert a claim for breach of contract, a plaintiff must allege the existence of a valid  
 20 contract, a breach of the contract, and damages. *See Meyers v. State*, 152 Wash. App. 823, 827,  
 21 828 (2009).

22 Defendant TrueBlue’s Motion to Dismiss Plaintiff’s contract claim, to the extent that she  
 23 makes one, is also well taken. Plaintiff fails to allege that she had any contractual relationship  
 24

1 with TrueBlue. Plaintiff should be given leave to file an amended complaint, if she wishes,  
2 before dismissal of this claim, however.

3 Defendant NTT Centerstance's Motion to Dismiss Plaintiff's contract claim should be  
4 denied. Plaintiff alleges that she had an agreement with Centerstance, that it was breached  
5 because she received on 14 days notice of termination of the agreement instead of 15 days, and  
6 that she was damaged.

7 **D. MOTION FOR A MORE DEFINITE STATEMENT**

8 Pursuant to Fed. R. Civ. P. 12(e), "a party may move for a more definite statement of a  
9 pleading to which a responsive pleading is allowed but which is no vague or ambiguous that the  
10 party cannot reasonably prepare a response."

11 Defendants' motions for a more definite statement (Dkts. 42 and 43) should be granted.  
12 Plaintiff makes vague allegations in her Complaint and does not connect a large majority of  
13 those allegations with any action/in action by Defendants. Further, some of Plaintiff's claims,  
14 including, "racial discrimination - interference with business contracts," "racial discrimination –  
15 harassment," and "racial discrimination – retaliation," are unclear as to whom they are being  
16 asserted against, and under which legal theory. (To the extent they are being asserted under the  
17 Washington Law Against Discrimination for events before May of 2008, they are barred by the  
18 statute of limitations.) Defendants are entitled to a more definite statement.

19 In the interest of giving Plaintiff every opportunity to make her case, she should be given  
20 leave, if she so wishes, to file an Amended Complaint, on or before March 30, 2013. Plaintiff  
21 should be mindful of the findings in this order and should not reassert claims that have been  
22 dismissed with prejudice.

23 **III. ORDER**

24 It is **ORDERED** that:

1) Defendant NTT Centerstance, Inc.'s Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B), and 12(b)(5) or, in the Alternative, for a More Definite Statement (Dkt. 42) **IS**

a) **DENIED** as to:

- Plaintiff's contract claim,

b) **GRANTED** as to:

- Plaintiff's claims under RCW 4.16.040(1) or RCW 49.6.020, to the extent that she makes them, her claims **ARE DISMISSED WITH PREJUDICE**; and
- To the extent that Plaintiff asserts claims under the Washington Law Against Discrimination, 49.60.010 *et seq.*, for events occurring before May of 2008, her claims **ARE DISMISSED WITH PREJUDICE**;

c) **RENOTED** to April 5, 2013 as to:

- Plaintiff's 42 U.S.C. § 1981 claim; and
- Plaintiff's claim under RCW 19.86.070, the Washington Consumer Protection Act;

2) Defendant NTT Centerstance's Motion for a More Definite Statement (Dkt. 42) is **GRANTED**.

3) Defendant TrueBlue, Inc.'s Joinder of Motion Filed by Centerstance, Inc. to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B), and 12(b)(5) or, in the Alternative, for a More Definite Statement (Dkt. 43) **IS**

a) **GRANTED** as to:

- Plaintiff's claims under RCW 4.16.040(1) or RCW 49.6.020, to the extent that she makes them, and those claims **ARE DISMISSED WITH PREJUDICE**;

- To the extent that Plaintiff asserts claims under the Washington Law Against Discrimination, 49.60.010 *et seq.*, for events occurring before May of 2008, her claims **ARE DISMISSED WITH PREJUDICE**;

**b) RENOTED** to April 5, 2013 as to:


- Plaintiff's 42 U.S.C. § 1981 claim;
- Plaintiff's claim under RCW 19.86.070, the Washington Consumer Protection Act; and
- Plaintiff's breach of contract claim.

4) Defendant TrueBlue's Motion for a More Definite Statement (Dkt. 43) is **GRANTED**;

5) Plaintiff's Amended Complaint, if any, should address the issues stated herein and should provide the more definite statement requested, and should be filed on or before **March 30, 2013**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 19<sup>th</sup> day of March, 2013.



ROBERT J. BRYAN  
United States District Judge